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**CASE NOTE:**

**Attheraces Limited v. The British Horseracing Board Limited**

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**Attheraces Limited v. The British Horseracing Board Limited**

By

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**A case note on the judgment of the Court of Appeal of England and Wales in *Attheraces Limited v. The British Horseracing Board Limited*, [2007] E.W.C.A. Civ. 38 (judgment of Feb. 2, 2007).**

Any realistic attempt to predict the future development and speed of the European Community's gradual shift to a more economics-based approach to antitrust law needs to take account of the likely effects of the devolution to Member States of enforcement of EC Treaty Articles 81 and 82 under the Modernisation Regulation (Regulation 1/2003). Although the national courts of the 27 Member States can refer legal questions to the European Court of Justice ("ECJ") under Article 234 of the Treaty where Community law is thought to be unclear, it will fall primarily to those national courts, as well as to national competition authorities, to apply EC competition law in individual cases. The willingness of national courts to participate in the shift to a more economics-based approach is therefore critical to the development of that shift.

Will those national courts slow the shift by resorting, for example, to straightforward applications of the somewhat simplistic tests for abuse of dominance and other oft-repeated mantras that can be found within the ECJ's historic case-law? Or will national courts accelerate

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the shift by interpreting and applying the Treaty provisions in a way which is compatible with modern conceptions of EC competition law as being a mechanism for delivering enhanced consumer welfare rather than for protecting corporations from one another irrespective of the consumer welfare dimension?

The recent judgment of the U.K. Court of Appeal of England and Wales (“Court of Appeal”) in *Attheraces* suggests that, at least in the case of the United Kingdom, the courts will help to accelerate the shift to an economics-based analysis of antitrust. The judgment is also interesting because the Court of Appeal had to grapple with three of the most difficult areas in antitrust law (excessive pricing, discriminatory pricing and refusal to supply), and had to do so in the context of the relevant legal tests having been expressed by the ECJ (in its judgment in the *United Brands*<sup>1</sup> case, for example) in typically Delphic terms. Moreover, these issues arose in *Attheraces* in the context of the supply of an intangible product: so-called “pre-race data” about British horseraces.

## **The Facts**

The Appellants were the British Horseracing Board and a subsidiary company, BHB Enterprises Plc (together, “BHB”). The BHB was responsible for the improvement, funding and promotion of British racing, of which it was the administrator and governing body. Pursuant to the Orders and Rules of Racing issued by the BHB and the Jockey Club, race organizers and others involved in British racing were required to submit certain pre-race information, in advance of any race, to “Weatherbys”, a company engaged by the BHB to collate that information and to distribute it to persons authorized by the BHB to receive it. This “pre-race

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<sup>1</sup> Case No. 27/76, *United Brands v. Commission*, [1978] E.C.R. 207.

data” included the details of each race, the names of the horses entered, and each declared runner together with its saddlecloth and stall number, age, weight, official rating, jockey, owner, and trainer. The pre-race data supplied by Weatherbys was the authoritative source of such information, which was essential for bookmakers to provide in betting shops to punters (bettors).

One of the challenges facing the BHB was the impending abolition of the horserace betting levy which, since its introduction in the mid-1960s, had provided funding for aspects of British horseracing by way of a compulsory 10 percent levy on the gross profits of U.K. bookmakers. The U.K. government’s proposal to abolish the levy made it necessary for the BHB to identify ways for better exploiting media and other rights with a view to replacing the funds which British racing had historically derived from the levy. One of rights which the BHB sought to exploit commercially was the right to receive the pre-race data. But this became complicated after the surprising ruling by the ECJ in November 2004 that the BHB did not have database rights in the pre-race data.<sup>2</sup> The right which the BHB was exploiting was, therefore, the right to be supplied with the data by Weatherbys, and then to make use of that data for certain agreed purposes.

The Respondents (“ATR”) essentially supplied a website, television channels, and other audio-visual media relating to British racing which were used by bookmakers and punters around the world. ATR was party to commercial arrangements with the BHB to be supplied with pre-race data for the purposes of a website and satellite TV channel aimed at viewers in the United Kingdom and the Republic of Ireland. Until March 2004, ATR also obtained pre-race

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<sup>2</sup> See *British Horseracing Board Ltd. v. William Hill Organisation Ltd.*, [2005] E.W.C.A. Civ. 863, [2005] R.P.C. 883, [2005] All E.R. (D) 149 (Jul).

data under an agreement with the BHB for supply in connection with broadcasts of British racing to overseas bookmakers, but that arrangement (whereby ATR could offset the price paid to the BHB against its payment to the racecourses for the picture rights) came to an end when ATR underwent a restructuring.

The dispute between the parties arose over the new arrangement which ATR and the BHB sought to negotiate when ATR recommenced broadcasting in June 2004, and then introduced a new audio-visual service specifically for those countries that allowed only pari-mutuel betting. These negotiations did not result in an agreement, essentially because the BHB sought a price for the supply of pre-race data corresponding to a 50 percent share of ATR's profits from those services. Although that was the same rate that BHB had charged under previous agreements, the charge was no longer subject to an offset and ATR therefore regarded this demand as grossly excessive. The matter came to a head when the BHB threatened ATR that unless payment was made, it would instruct its suppliers to cease providing ATR with the pre-race data. This prompted ATR to obtain an interim injunction in the Chancery Division. ATR's unhappiness with the BHB's demands was compounded when it learned during those interim proceedings that the BHB had agreed to provide pre-race data to another broadcaster to overseas bookmakers ("Phumelela") in return for a profit share of only 30 percent (though ATR regarded even this percentage as excessive).

In its claim, ATR alleged that the BHB had infringed Article 82 EC by abusing its dominant position in the market for the supply of pre-race data concerning British races. It also alleged that the BHB had infringed the Chapter 2 prohibition of the United Kingdom's Competition Act 1998 (which is effectively identical to Article 82 except that it applies to competition within the United Kingdom even where there is no effect on trade between Member

States). The allegedly abusive conduct to which ATR pointed consisted of (i) an unreasonable (constructive) refusal to supply the data to ATR, (ii) excessive and unfair pricing of that data, and (iii) discriminatory pricing of that data.

### **Trial in the High Court**

At first instance, Justice Etherton accepted ATR's submissions that the relevant market was the non-U.K. or worldwide market "for the supply of UK pre-race data to those in the horse racing industry that require such information for the services they provide their customers (in particular, bookmakers and producers of TV channels or internet sites relating to horse racing)," and that the BHB had a dominant position in that market.

In a long judgment,<sup>3</sup> Etherton then went on to find that the BHB had abused its dominance by, inter alia, threatening to withhold pre-race data to ATR, both because the data was an "essential facility", and because ATR was to be regarded as an existing customer, since BHB sought payment from ATR as an agent for the overseas bookmakers when, the judge held, there was no agency in fact or in law.

More significantly, the judge also found, as an independent example of abuse of its dominant position that the BHB was seeking to charge "excessive and unfair" prices. The judge held that the price sought was far in excess of the "competitive price". The judge found that this "competitive price" was represented by a reasonable allocation to ATR of the BHB's costs of collating and distributing the data, together with a reasonable return on those costs. It followed, the judge further held, that the BHB had sought to insist on prices which bore "no reasonable

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<sup>3</sup> *Attheraces Limited v. British Horseracing Board Limited* [2005] E.W.H.C. 3015 (Ch) (judgment of Dec. 21, 2005).

relation to the economic value of the product,”<sup>4</sup> the “economic value” having to be assessed without regard to the costs of producing “positive externalities” to British racing (i.e., the general costs of creating conditions which made British racing attractive broadcasters and bettors). Furthermore, the prices demanded by the BHB were determined to be discriminatory, there being no objective justification for demanding substantially higher fees from ATR than from Phumelela and other broadcasters.

### **The BHB’s Grounds of Appeal**

The BHB appealed to the Court of Appeal on a number of grounds, but most significantly on the ground that the judge had erred in his approach and conclusion as to whether the prices demanded were “excessive and unfair”. The BHB took no issue with the judge’s definition of the relevant market or his finding that the BHB was dominant in that market. However, the BHB argued that it was not wholly unconstrained in the prices which it could charge in that market, since the BHB was not itself engaged in supply to overseas bookmakers, and was dependent upon supply to ATR if it was to derive revenue from that source; whereas ATR would only acquire the pre-race data at a price which would be profitable for ATR within the competitive overseas markets in which it supplied its audiovisual services to bookmakers.

In its submission, the BHB asserted that the judge had been wrong to regard the “competitive price” of a product as necessarily being represented by the costs of producing or providing it plus a reasonable return (“the cost+ formula”). Even companies which provided products in a competitive market could often obtain prices which exceeded any figure produced

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<sup>4</sup> United Brands, *supra* note 1, at para. 250.

by that formula. That was because a competitive price reflected not merely the cost of production, but also the value of the product to the purchaser.<sup>5</sup> A successful broadcaster such as ATR could, for example, hope to make profits within competitive markets that exceeded a reasonable rate of return on its costs. The area for price negotiation between ATR and the BHB was in relation to how such profits should be shared as between the broadcaster (who bore the risks associated with the development and provision of the broadcasted services) and the BHB (which had responsibility for and/or funded various activities which contributed to the attractiveness and integrity of British racing; benefits which, in turn, were fundamental to the true economic value of both the pre-race data itself and the broadcast services which ATR provided).

Further, even if the BHB's prices did exceed the "competitive price," it did not follow that those prices bore "no reasonable relation to the economic value of the product," since that value could certainly not be automatically equated with the product of the cost+ formula. This was particularly true in the case of an intangible product such as broadcasting rights or data rights to sports events, for which the direct cost of supply would often be very substantially less than the revenue that could be earned by a broadcaster in the downstream market. The BHB argued that it was clear from *United Brands* that the critical test was whether a price could be held to bear "no reasonable relation to the economic value of the product" and not simply whether it was substantially in excess of the costs of production on the supply side. The judge had erred by conflating these two questions. Moreover, he had failed to take account of the BHB's role in making possible the kind of British horseracing which punters around the world

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<sup>5</sup> In that regard, the BHB relied on the EC Commission's decision in *Scandlines Svergie AB v. Port of Helsingborg*, [2006] 4 C.M.L.R. 23, as well as para 48 of the judgment of Laddie J in *BHB Enterprises Plc v. Victor Chandler (International) Limited*, [2005] E.W.H.C. 1074 (Ch), [2005] All E.R. (D) 445 (May).



wanted to bet on. The BHB's performance of that role produced obvious benefits for ATR and, in that context, the prices demanded were not "unfair".

### **Judgment of the Court of Appeal**

The Court of Appeal (consisting of Lord Justices Mummery, Sedley, and Lloyd) unanimously allowed the BHB's appeal. The Court held that the critical issue in the case was whether the price sought by the BHB was abusive. The issue of refusal to supply had to be considered in that context, since the BHB had been willing to supply ATR at that price, and abuse was an objective concept.

In determining whether an entity had abused its dominant position by charging excessive prices, the analysis must begin with the principles set out by the ECJ in its judgment in *United*

*Brands*:

In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be ... an abuse.

This excess could, *inter alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin;

[...]

The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.<sup>6</sup>

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<sup>6</sup> *United Brands*, *supra* note 1, at paras. 250-52.

This passage had to be read and applied with care, and in fact posed two questions which had both to be answered affirmatively for a price to be found to bear “no reasonable relation to the economic value of the product supplied” and thus abusive:

- (1) Was the difference between the costs incurred and the price charged excessive?
- (2) If so, was the price unfair in itself or when compared with competing products?

Notably, the ECJ did not say that the economic value of a product was always to be ascertained by reference to the cost+ formula, or that a price which was higher than one produced by the formula was necessarily excessive and an abuse.

Further, the Court of Appeal stated that the law on abuse of dominance was about preventing distortions of competition and safeguarding the interests of consumers, not about prohibiting suppliers from making “excessive profits” by charging other undertakings prices yielding more than a reasonable return on the costs of production. In that regard, the Court referred to the ECJ case of *Bronner* in which Advocate General Jacobs had stated that it was important not to lose sight of the fact that the primary purpose of Article 82 was “to prevent distortion of competition—and in particular to safeguard the interests of consumers—rather than to protect the position of particular competitors.”<sup>7</sup>

Accordingly, in grappling with the difficult question of whether the difference between the costs incurred by the BHB in compiling and distributing the pre-race data, and the prices which it sought to charge for that data, were “excessive”, the Court had to look beyond ATR’s immediate interests to the market which it served. While it might be thought unfair that the BHB was asking for a 50 percent share of profits even though all the risks of the relevant

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<sup>7</sup> Case No. C-7/97, *Bronner v. Mediaprint*, [1998] E.C.R. I-7791 at 7811, Opinion of Advocate-General Jacobs, at para 58.

broadcasting ventures were being carried by ATR, this could not in itself amount to an abuse of dominance. It was incontestable that overseas bookmakers, who were making commercial use of the services supplied to them by ATR, were paying ATR, in a competitive market, prices in respect of those services which afforded it a handsome profit. Furthermore, there was little, if any, evidence that competition in that market was being distorted by the price demands made of ATR by the BHB. In that context, the judge below had been wrong in holding that the economic value of the data was represented by the cost+ formula.

The Court of Appeal then rejected a number of arguments which ATR had put forward which purported to demonstrate that BHB's refusal to supply had been unreasonable even if the price demanded had not exceeded the economic value of the product. More importantly, the Court also rejected an argument that the BHB had abused its dominant position by discriminating against ATR in the prices charged to other broadcasters. Here the Court again relied on the purposes behind Article 82, which were reflected in the reference in that Article to "applying dissimilar conditions to equivalent transactions with other trading parties, *thereby placing them at a competitive disadvantage.*" (emphasis added) The Court noted that the charging of different prices to different customers for equivalent transactions was not prohibited per se, but only where it gave rise to an actual or potential distortion of competition between those customers. There was no evidence of such a distortion in this case.

The Court's judgment also suggests that, even if the BHB's prices had been found to be "excessive", it is likely that, in view of the BHB's role in administering and funding aspects of British racing and thereby promoting its quality and profile, those excessive prices would have nevertheless escaped a finding of abuse.

## Comments

In this highly significant judgment, the Court of Appeal of England and Wales found itself having to grapple with a question which has long been a source of considerable difficulty for competition lawyers: when do prices charged by a dominant undertaking cross the threshold of being so excessive as to constitute an abuse?

The *United Brands* case had concerned bananas, a common commodity in respect of which relatively free competition might have been expected to exist, and to have reduced prices to a reasonable return on the costs of an efficient operator. The European Commission's suspicions of abuse had arisen because United Brands was selling bananas in Germany at considerably higher prices than in Ireland while still making a profit in the latter market. In that context, it is understandable that the ECJ's judgment, in determining whether prices charged in Germany were excessive, focused on whether those prices were delivering profits for that company which were greatly in excess of a reasonable return on costs.

The pre-race data supplied by the BHB was a very different product from bananas. Counsel for the BHB before the Court of Appeal (Peter Roth QC) cited rights to televise U.K. football matches as an example of an intangible product which was typically sold at prices far in excess of the costs of production. The cost to the football club of "producing" that product (assuming that the football match would take place in any event) may be almost zero, assuming that the television company supplies the necessary filming equipment itself. The economic value to the television company of that right may, however, be very considerable given the high ratings that many football matches are able to draw. Accordingly, "cost +" would not represent a reasonable approximation of the true economic value of that right, and to require the football

club to charge no more than “cost +” for that right would deprive the club (the provider of the activity which is fundamental to the economic value of the right) from sharing in that value.

The Court of Appeal’s approach to these questions was firmly rooted, in line with modern trends in competition jurisprudence, in the purposes of competition law: to protect competition, and ultimately, consumers. The BHB’s prices were not found to be excessive because there was no evidence that they were undermining competition in downstream markets. A similar approach was taken to the question of whether the BHB was guilty of abuse by price discrimination.

The Court of Appeal’s carefully reasoned judgment bodes well for EC antitrust law in terms of the prospects of national courts—or at least those of the United Kingdom—adopting an increasingly economics-based approach to antitrust analysis. Such an analysis would require, in each individual case, a careful consideration of the effects on competition of the agreement or conduct at issue, and would evaluate the lawfulness of that agreement or conduct in the context of a purposive interpretation of Articles 81 and 82. Given the preeminence of the United Kingdom among the EC Member States as a busy and relatively well-advanced jurisdiction for antitrust law, there is a real opportunity for the U.K. courts to play a significant role in the development of a more economics-based approach to competition law in the European Community as a whole.